

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION  
5:06-HC-2195-BR-JG

UNITED STATES OF AMERICA, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 GRAYDON EARL COMSTOCK, JR., )  
 )  
 Respondent. )

**ORDER**

This case comes before the court on respondent's motion (D.E. 114) to quash the government's amended notice of the *de bene esse* deposition of M. Lela Demby, Ph.D. and, implicitly, the associated subpoena to Dr. Demby (D.E. 117-1). The testimony taken at the deposition would be for use at the commitment hearing in this case, currently set to begin on 28 November 2011. The amended notice sets the deposition for Thursday, 10 November 2011, at 9:00 a.m. The court held a telephone conference with counsel regarding the motion yesterday, 7 November 2011. The government has since filed a memorandum in opposition (D.E. 117) supported by a declaration by Dr. Demby (D.E. 117-2)<sup>1</sup> regarding the circumstances that the government contends warrant the taking of the *de bene esse* deposition, namely, long-scheduled personal travel by Dr. Demby during the week on which the commitment hearing is scheduled.

The court finds that the *de bene esse* deposition is unsatisfactory because it would not permit questioning of Dr. Demby by the court.<sup>2</sup> The opportunity for such questioning is essential

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<sup>1</sup> The government filed a separate copy of the declaration along with a copy of the amended notice and associated subpoena at D.E. 116 and 116-1, respectively.

<sup>2</sup> The noticed date for the deposition is unsatisfactory because it presents a conflict for respondent's counsel, but in the telephone conference the government indicated its willingness to move the deposition to next week to address this concern. It also states in its memorandum its intent to change the date of the deposition to accommodate

because of the potential significance of expert testimony in this case, including that of Dr. Demby. The amended notice and associated subpoena are therefore QUASHED. The government shall not re-notice the *de bene esse* deposition of Dr. Demby.

Notwithstanding this ruling, the court agrees that Dr. Demby's travel plans should definitely not be disrupted by having to appear in person at the commitment hearing nor, if at all possible, by having to appear by video conference. The conflict her travel presents appears better resolved by rescheduling the commitment hearing to the second week of the session before Judge Friedman or taking her testimony out of turn during the session. Counsel shall confer regarding a resolution consistent with this order and may file a joint motion or separate motions for appropriate relief. If not resolved before then, the conflict will be resolved by the court at the calendar call for this and the other cases scheduled for the 28 November to 9 December 2011 commitment hearing session. The calendar call will held in the Sixth Floor Courtroom of the Terry Sanford Federal Building and Courthouse in Raleigh beginning at 1:00 p.m. on Friday, 18 November 2011.

SO ORDERED, this 8 day of November 2011.

  
James E. Gates  
United States Magistrate Judge

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respondent's counsel. (Govt.'s Mem. 4 n.2).